

HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

M. LEONARD SIMPSON, et al.,

Plaintiffs,

v.

INTER-CON SECURITY SYSTEMS,
INC.,

Defendant.

CASE NO. C12-1955RAJ

ORDER

I. INTRODUCTION

This matter comes before the court on the motion of Defendant Inter-Con Security Systems, Inc. (“Inter-Con”) to compel arbitration of Plaintiffs’ claims. Although both parties requested oral argument, the court finds oral argument unnecessary. For the reasons stated below, the court GRANTS the motion (Dkt. # 12) in part and DENIES it in part. This order concludes with instructions for supplemental briefing to permit the court to decide whether an arbitrator must decide Plaintiffs’ claims.

II. BACKGROUND

From 2008 to 2010, Plaintiffs M. Leonard Simpson and Tural Alisker worked as security guards for Inter-Con. Inter-Con contracts with other entities to provide security services. Both Mr. Simpson and Mr. Alisker worked at the Seattle campus of the Bill and

1 Melinda Gates Foundation. Bob Laughlin was the manager of Inter-Con's Gates
2 Foundation team at all relevant times.

3 Plaintiffs contend that Inter-Con is liable for various violations of federal and state
4 wage-and-hour laws. They assert, for example, that Inter-Con required them to
5 participate in 15-minute pre- and post-shift security briefings without pay. They assert
6 that they were required to work through meal and rest breaks. They assert that they are
7 entitled to overtime.

8 Putting aside a few wage claims that they bring solely on their own behalf,
9 Plaintiffs hope to pursue their claims on behalf of two groups of similarly situated Inter-
10 Con employees. With respect to their federal claims, which invoke the Fair Labor
11 Standards Act ("FLSA"), they hope to serve as representatives in a collective action on
12 behalf of Inter-Con security guards nationwide. With respect to their Washington-law
13 claims, they hope to serve as representatives of a class action on behalf of Inter-Con's
14 Washington security guards.

15 Trying to cut Plaintiffs off at the pass, Inter-Con filed this motion to compel
16 arbitration. It contends that both Plaintiffs signed an arbitration agreement covering all of
17 their claims in this suit. Because that arbitration agreement precludes class actions,
18 collective actions, and class arbitration, Inter-Con further contends that Plaintiffs have no
19 right to pursue claims on behalf of other Inter-Con guards.

20 The court first considers whether the arbitration agreement that Inter-Con invokes
21 covers Plaintiffs' claims and whether they can avoid that agreement by relying on
22 Washington unconscionability law. The court then considers a threshold issue – whether
23 Inter-Con has established that both Plaintiffs actually entered the arbitration agreements
24 at issue.

III. ANALYSIS

A. The Arbitration Agreement Covers Plaintiffs' Claims and Is Not Procedurally Unconscionable.

The Federal Arbitration Act ("FAA") creates a strong presumption in favor of the enforcement of an agreement to arbitrate. *Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205, 1209 (9th Cir. 1998). When a valid arbitration agreement covers a dispute a party raises in a lawsuit, the court must order arbitration and stay the litigation pending the arbitration's outcome. 9 U.S.C. § 3. The court must first determine whether the disputes before it are within the scope of the arbitration agreement. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985). Resolving these arguments requires the court to apply "federal substantive law of arbitrability." *Id.* (citation omitted). That law respects the "liberal federal policy favoring arbitration agreements" embodied in the FAA. *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). That law requires the court to resolve "any doubts concerning the scope of arbitrable issues . . . in favor of arbitration," including any doubts about contract interpretation. *Id.* at 24-25.

Here, there is no dispute that the arbitration agreement, assuming Plaintiffs actually agreed to it, covers all of Plaintiffs' claims. The agreement expressly covers "claims for wages or other compensation due[,] claims for breaks and rest periods[,] and "claims for breach of any contract" Laughlin Decl., Ex. A (Arb. Agr. at 1).

Once a court establishes that a claim is within the scope of an arbitration agreement, the agreement is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. State law may supply grounds for declaring a contract unenforceable, including state unconscionability law. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686-87 (1996).

1 Plaintiffs contend that the Inter-Con arbitration agreement is procedurally
 2 unconscionable under Washington law.¹ That contention falls within the scope of § 2 of
 3 the FAA. *See, e.g., Kilgore v. Keybank, N.A.*, Nos. 09-16703, 10-15934, 2013 U.S. App.
 4 LEXIS 7312, at *12-14 (9th Cir. Apr. 11, 2013) (en banc). In Washington, an agreement
 5 is procedurally unconscionable if, considering the circumstances in which the parties
 6 made the agreement, one party lacked “a meaningful choice” to enter the agreement.
 7 *Adler v. Fred Lind Manor*, 103 P.3d 773, 781 (Wash. 2004).² Whether a contract is
 8 unconscionable is a question of law for the court. *Id.* at 781. “The party opposing
 9 arbitration bears the burden of showing that the agreement is not enforceable.” *Zuver v.*
 10 *Airtouch Commc’ns, Inc.*, 103 P.3d 753, 759 (Wash. 2004).

11 The evidentiary support for Plaintiffs’ claim of procedural unconscionability
 12 comes from their declarations. They assert that they had no power to negotiate the terms
 13 of the Inter-Con arbitration agreement. They assert that Inter-Con neither explained the
 14 agreement nor gave them adequate time to review it. They assert that Inter-Con required
 15 them to either sign the agreement or forego employment.

17 ¹ Plaintiffs do not contend that the agreement is substantively unconscionable. *See Adler v. Fred*
 18 *Lind Manor*, 103 P.3d 773, 781 (Wash. 2004) (“In Washington, we have recognized two
 19 categories of unconscionability, substantive and procedural.”). Plaintiffs apparently interpret
 20 *Coneff v. AT&T Corp.*, 673 F.3d 1155 (9th Cir. 2012) to preempt all applications of
 21 Washington’s substantive unconscionability doctrine to arbitration agreements. Pltfs.’ Opp’n
 22 (Dkt. # 15) at 6. The court suggests no view on Plaintiffs’ interpretation of *Coneff*, other than to
 observe that *Coneff* acknowledges that the Supreme Court has ruled that the FAA preempts state
 law to the extent it deems class action waivers (like the one in Inter-Con’s arbitration agreement)
 substantively unconscionable. *Coneff*, 673 F.3d 1155, 1160 (9th Cir. 2012) (citing *AT&T*
Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011)).

23 ² As other courts have observed, no binding Washington authority addresses whether procedural
 24 unconscionability, standing alone, is a sufficient basis to declare a contract unenforceable. *See,*
 25 *e.g., Coneff*, 673 F.3d at 1161 n.4. Washington’s Supreme Court has made inconsistent
 26 pronouncements. *Compare Adler*, 103 P.3d at 782 “[W]e decline to consider whether
 27 [procedural unconscionability] alone will support a claim of unconscionability.”) with *Gandee v.*
 28 *LDL Freedom Enters., Inc.*, 293 P.3d 1197, 1199 (Wash. 2013) (citing *Adler* for proposition that
 “either substantive or procedural unconscionability is sufficient to void a contract”) (emphasis in
 original). For purposes of this order only, the court assumes Plaintiffs could avoid the arbitration
 agreement merely by showing it to be procedurally unconscionable.

1 Accepting each of Plaintiffs' assertions as true, the arbitration agreement is not
2 procedurally unconscionable. In determining whether a party had a meaningful choice in
3 entering a contract, a court considers whether the contract is a contract of adhesion,
4 whether the parties had equal bargaining power, whether the party had a meaningful
5 opportunity to read and understand it, and whether the contract hid critical clauses in a
6 "maze of fine print." *Adler*, 103 P.3d at 782-84. A court must apply these factors
7 flexibly, keeping its focus on "whether in fact a meaningful choice existed." *Id.* at 784
8 (citation omitted). The court accepts that the agreement was a contract of adhesion.
9 Inter-Con does not dispute that Plaintiffs had no opportunity to negotiate its terms, and
10 does not dispute that signing it was a mandatory condition of employment. But adhesion
11 contracts and unequal bargaining power are the norm in employee arbitration agreements,
12 and they are not by themselves sufficient to declare an agreement unconscionable. *Adler*,
13 103 P.3d at 783; *Zuver*, 103 P.3d at 760-61. An employee arguing that an arbitration
14 agreement is procedurally unconscionable bears a threshold burden:

15 At a minimum, an employee who asserts an arbitration agreement is
16 unconscionable must show some evidence that the employer refused to
17 respond to her questions or concerns, placed undue pressure on her to sign
18 the agreement without providing her with a reasonable opportunity to
19 consider its terms, and/or that the terms of the agreement were set forth in
20 such a way that the average person could not understand them.

21 *Zuver*, 103 P.3d at 761. Plaintiffs do not meet their threshold burden. They do not
22 contend that the agreement was buried in fine print or written in a manner beyond the
23 comprehension of a layperson. They would be hard pressed to do so, as the agreement is
24 a standalone document written in a standard-sized typeface. A layperson reading it
25 would understand, at a minimum, that she was giving up her right to take Inter-Con to
26 court over wage-and-hour claims. Although Plaintiffs contend they had little time to
27 consider the agreement, they do not contend that they attempted to consider it, attempted
28 to ask questions about it, or even that they would have asked questions if they had more
time. The agreement is not procedurally unconscionable.

B. The Court Requires Supplemental Briefing to Determine Whether Plaintiffs Actually Entered the Arbitration Agreement.

Plaintiffs at least attempt to raise a dispute about whether either of them signed the Inter-Con arbitration agreement. Mr. Alisker does so, if at all, only indirectly. Inter-Con has produced a copy of the agreement bearing his signature. It has also produced a “Policy Acknowledgment” form bearing his signature. Laughlin Decl., Ex. B. The Policy Acknowledgment is a list of eleven Inter-Con “policies,” one of which is the arbitration agreement. The Acknowledgment states that “[b]y my signature, I am acknowledging that I have received the Company policies as indicated below and that as a condition of employment; I will read and follow the guidelines in these policies as written.” *Id.* On the Policy Acknowledgment that Mr. Alisker signed, eleven boxes corresponding to eleven “policies” bear handwritten checkmarks. Mr. Alisker does not contest that his signatures on the arbitration agreement and Policy Acknowledgment are genuine. He merely asserts that he “do[es] not recall signing any documents containing an arbitration agreement” Alisker Decl. ¶ 10.

For Mr. Simpson, by contrast, Inter-Con admits that it is unable to produce a signed arbitration agreement. Mr. Laughlin contends that Mr. Simpson’s personnel file is missing. Laughlin Decl. ¶ 8. He is convinced that Mr. Simpson signed an arbitration agreement, however, because “it was [Inter-Con]’s practice to have each security officer employee working at the Gates Foundation sign the same arbitration agreement” *Id.* Despite the “missing” personnel file, Inter-Con has produced a Policy Acknowledgment bearing Mr. Simpson’s signature. *Id.*, Ex. C. Mr. Simpson does not contest that the signature is genuine. Instead, just like Mr. Alisker, he asserts that he “do[es] not recall signing any documents containing an arbitration agreement” Simpson Decl. ¶ 11.

The parties do not acknowledge that the FAA treats questions about whether a party entered an arbitration agreement differently than other questions bearing on arbitrability. As noted in the previous section, the court must determine the scope of an

1 arbitration agreement by construing all ambiguities in favor of arbitration. And as also
 2 noted in the previous section, Washington law entrusts the court to determine procedural
 3 unconscionability as a matter of law, at least where no factual disputes are critical to that
 4 determination. But, as to the question of whether a party actually entered an arbitration
 5 agreement, the FAA takes a different tack:

6 The court shall hear the parties, *and upon being satisfied that the making of*
 7 *the agreement for arbitration or the failure to comply therewith is not in*
 8 *issue*, the court shall make an order directing the parties to proceed to
 9 arbitration in accordance with the terms of the agreement. . . . If the making
 of the arbitration agreement or the failure, neglect, or refusal to perform the
 same be in issue, the court shall proceed summarily to the trial thereof.

10 9 U.S.C. § 4 (emphasis added). The same provision provides, among other things, that
 11 the party contesting the existence of an arbitration agreement is entitled to a jury trial if
 12 she has already demanded one. *Id.*

13 No party mentions § 4 of the FAA, and no party offers argument or authority
 14 relevant to the standards or procedures a court should employ in deciding whether
 15 Plaintiffs entered the arbitration agreement. So far as the court is aware, the Ninth
 16 Circuit has not squarely addressed this issue. It has held that a court, not an arbitrator,
 17 must decide whether the parties entered a contract containing an arbitration clause. *Three*
 18 *Valleys Mun. Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136, 1142 (9th Cir. 1991); *see*
 19 *also Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 n.1 (2006) (declining
 20 to disturb lower-court precedent requiring court, not arbitrator, “to decide whether the
 21 alleged obligor ever signed the contract”); *Rent-A-Center, West, Inc. v. Jackson*, 130 S.
 22 Ct. 2772, 2778 n.2 (2010) (same). The Ninth Circuit has not, so far as the court is aware,
 23 explained what standards apply when a court considers whether a party entered an
 24 agreement. In one case, the Seventh Circuit remanded after finding that the district court
 25 had not adequately addressed a factual dispute over the validity of a signature on an
 26 arbitration agreement. *Deputy v. Lehman Bros., Inc.*, 345 F.3d 494, 502, 509-10 (7th Cir.
 27 2003). The court concluded that handwriting samples were sufficient to “create an issue

1 of fact as to whether [the plaintiff] in fact had signed” the arbitration agreement in
2 question. *Id.* at 510. Citing § 4 of the FAA, the court remanded the issue without
3 deciding whether a jury or the court would resolve it. *Id.* at 510 & n.4 (“[T]he district
4 court should have considered the similarities to determine whether a trial on the issue was
5 necessary under Section 4.”). Other circuits have also looked to whether there is a
6 genuine issue of material fact as to whether a plaintiff signed the arbitration agreement.
7 *E.g., Chastain v. Robinson-Humphrey Co.*, 957 F.2d 851, 854 (11th Cir. 1992).

8 In light of this persuasive authority, the court holds that the resolution of factual
9 questions as to whether a party entered an arbitration agreement is no different than the
10 resolution of most factual questions. The court decides the question on summary
11 judgment if there is no dispute of material fact, otherwise the court conducts a jury or
12 bench trial. Here, no party has requested summary judgment. Nonetheless, the court is
13 empowered to grant summary judgment on its own motion, provided it gives the parties
14 notice and an opportunity to respond. Fed. R. Civ. P. 56(f)(3). The court accordingly
15 gives notice to the parties as follows:

- 16 1) As to Mr. Alisker, the court reaches the preliminary conclusion that there is no
17 genuine issue of material fact regarding his assent to enter the arbitration
18 agreement. He does not contest that his signature is on the arbitration
19 agreement Inter-Con produced. His mere assertion that he does not remember
20 signing the agreement is insufficient to create a genuine issue of material fact.
21 *See Blanford v. Sacramento County*, 406 F.3d 1110, 1113 n.3 (9th Cir. 2005)
22 (noting that court considering summary judgment may accept defendant’s
23 version of plaintiff’s conduct where plaintiff merely testifies that he does not
24 remember a particular act).
- 25 2) As to Mr. Simpson, the court reaches the preliminary conclusion that there is a
26 genuine dispute of fact regarding his assent to enter the arbitration agreement.

As Inter-Con admits, it cannot produce an arbitration agreement bearing his signature. The presence of the Policy Acknowledgment in which Mr. Simpson appears to acknowledge the arbitration agreement is insufficient. A reasonable jury could conclude that Mr. Simpson mistakenly checked the box on the form corresponding to the arbitration agreement, when in fact he never received the agreement. Even accepting that Inter-Con's ordinary practice was to present the arbitration agreement to all new employees, a reasonable jury could conclude that Inter-Con did not follow its ordinary practice with Mr. Simpson. The court must conduct a trial (or other fact-finding procedure, if the parties agree to one) to determine if Mr. Simpson signed the arbitration agreement.

No later than May 22, 2013, Plaintiffs (collectively) and Inter-Con may each submit a brief of ten pages or fewer citing authority, evidence, and argument articulating any disagreement with the preliminary rulings above. No later than May 30, 2013, they shall each submit a brief responding to the other party. The court will not accept reply briefs. The supplemental briefing shall address only Part III.B of this order.

IV. CONCLUSION

For the reasons previously stated, the court GRANTS Inter-Con's motion (Dkt. # 12) in part and DENIES it in part. The court grants the motion in that it concludes that the arbitration agreement is not procedurally unconscionable and that, assuming Plaintiffs signed it, it mandates arbitration of all of Plaintiffs' claims and precludes pursuing those claims on a classwide basis. The court denies the motion, pending supplemental briefing, to the extent it seeks a ruling that Plaintiffs actually signed the arbitration agreement.

DATED this 10th day of May, 2013.



The Honorable Richard A. Jones
United States District Court Judge